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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANDY HOYEN TO, Defendant and Appellant.	B201292 (Los Angeles County Super. Ct. No. GA066272)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie E. Brown, Judge. Reversed.

Wegman, Levin & Stanley, Michael M. Levin, John J. Stanley and Debra J. Wegman for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Mandy Hoyen To of the second degree murder of Mauson Luong and found that she used a deadly weapon (a knife) to commit the crime. This appeal raises two separate contentions. The first concerns instructional error. Primarily, defendant urges that the trial court committed prejudicial error when it denied her request to instruct about self-defense, imperfect self-defense, involuntary manslaughter and accident. Secondarily, defendant urges that the trial court had a sua sponte duty to instruct on voluntary manslaughter based upon a killing committed in the heat of passion. We find that the contention of instructional error is well-taken because the record contains substantial evidence to support the underlying theories. Further, none of the issues covered by the rejected instructions was raised by the submitted instructions. Consequently, we cannot find that the jury, in convicting defendant of second degree murder, necessarily resolved the factual questions posed by the rejected instructions adversely to her. Instead, we conclude the instructional error was prejudicial because it is reasonably probable that the jury would have rendered a verdict more favorable to defendant had it been properly instructed. We will therefore reverse for retrial. Our disposition renders it unnecessary to discuss defendant's second contention of prosecutorial misconduct.

STATEMENT OF FACTS

1. *The Evidence*

Defendant (then 21years old) fatally stabbed Mauson Luong in the left upper chest after he and her 16-year old brother (Wallace To) had fought.

Wallace To (To) testified as follows.[1] During the early evening of July 5, 2006, he was communicating on line with his best friend Richard Luong (Richard) and Richard's cousin Mauson Luong (Mauson).[2] To decided to have dinner with defendant (his sister), Davis Peng (Peng) and Richard. Mauson asked if he could join them. To asked defendant who said "no" because she did not know Mauson. To repeated this to Mauson who made hostile remarks about defendant and threatened "to beat [To's] ass." To later told defendant that Mauson "was angry and that he was talking shit." Defendant replied in a sarcastic manner.

While defendant, To, Peng, and Richard were driving to dinner, To received a threatening phone call from Mauson. Defendant took the cell phone from To, and, in an aggravated tone, told Mauson: "Shut the fuck up, you're gonna do shit." She also told To that "he was a pussy. That he didn't have any balls to do anything." Defendant and To decided to drive to the Luong residence. To intended to fight Mauson but he did not expect Mauson to have a weapon. ~CT 226; RT 1267)~ To knew Mauson was "a very violent person."

When the group arrived, To alighted from the car. Mauson ran toward To and punched him. To returned the blow and the two men fought. Mauson used brass knuckles during the fight. At one point, defendant said: "Fuck 'em [Mauson] up." After a short time, the two men stopped fighting. Each stood hunched over, trying to catch his breath. To began to walk away from Mauson. According to To, the fight "was completely over" but defendant, who was now standing outside of the car, attempted to provoke Mauson. Defendant called

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[1] To conceded that initially he gave the police false versions of the events.

[2] Because the two men share the surname "Luong," we shall refer to them by their first names for purposes of clarity.

Mauson "a pussy" and yelled: "Why do you have to use brass knuckles on a one-on-one fight? Put down the brass knuckles. Drop them." Defendant stepped between the two men.

Mauson told defendant: "I'm not going to hit a girl, I'm not going to hit a girl." Defendant walked toward Mauson. To did not see Mauson take any aggressive action against defendant. To did not see defendant stab Mauson but when she returned to his (To's) side, she had a knife in her hand. (To had previously seen defendant carry a knife concealed in her purse "just for her own purpose.")

To testified that defendant called "911" to report the stabbing but falsely told the operator that "the people that did the stabbing [had] left." Defendant told To to tell the police "that four Hispanics came and jumped us."

Richard's trial testimony about the subject events was similar to To's.[3] In regard to the stabbing, Richard testified that defendant confronted Mauson after Mauson and To had separated. Mauson told defendant: "I'm not going to hit a girl." Defendant tried to grab the brass knuckles from Mauson, asking him why he had used them. Mauson replied that the fight was between him and To. Within 30 seconds, defendant stabbed Mauson in the chest, stating: "What, you didn't think I was going to do it?"[4] According to Richard, Mauson never made an aggressive move toward defendant.

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[3] Richard conceded that initially he told the police false versions of the events because he was afraid of defendant.

[4] Teresa Diaz, who lived in the neighborhood, testified that she heard defendant, in angry voice, state: "Do you think I won't do it? Of course, I will" immediately before she (Diaz) heard a metal object fall to the ground. Diaz, however, was unable to supply any other details about the confrontation.

Peng testified as follows about the altercation.[5] Mauson struck To and the two men fought for several minutes. During the fight, defendant left her car and watched the two men fight. When the two stopped fighting, defendant stepped between them. Mauson took a step forward. Defendant told Mauson to drop the brass knuckles and "called him a bitch, called him a punk for having knuckles out in the middle of a fight." Mauson "cocked his hand back" on which he was wearing the brass knuckles, but then put it down, stating: "I'm not going to hit a girl." Defendant had her knife out and was pointing it toward Mauson. She told him to "fight fair" and to drop the brass knuckles.

The remaining portion of Peng's testimony constitutes a significant part of the evidence upon which defendant relied when she later unsuccessfully sought instructions about self-defense, imperfect self-defense, involuntary manslaughter and accident. On direct examination by the prosecutor, Peng testified that Mauson "walked over and tried to lunge at [defendant]." Defendant, with her arm extended, made a "thrusting and slashing motion" with the knife. According to Peng, as defendant "kind of slanted backwards," Mauson "went towards her and he got into the knife."[6]

On cross-examination by defense counsel (see fn. 8, *post)*, Peng explained that when defendant stepped between Mauson and To, the fight did not appear to be over "because Mauson seemed kind of aggressive at the moment." After defendant profanely told Mauson not to use the brass knuckles, Mauson had "[his] right arm up with the knuckles and made a stance." Mauson said: "I'm not going

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[5] Peng conceded that initially he falsely told the police that he had not even been at the scene of the stabbing.

[6] Peng had told the police that "Mauson kind of walked into the knife."

to hit a girl." Defendant told Mauson to drop the brass knuckles. He did not drop them but, instead, raised his right fist into the air and "made a quick lunge" toward defendant. Defendant "kind of pulled back her arm and hit [Mauson] with a knife."[7]

Defendant's statements to the police, introduced into evidence by the prosecution, constitute the last portion of the evidence about the crime. As will be seen, defendant relied upon some of these statements when she made her unsuccessful request for instructions. Her interview began with false explanations of the stabbing. First, defendant claimed that a group of strangers attacked Mauson and To. Then, she claimed that To had stabbed Mauson. Ultimately, she admitted she has stabbed Mauson but claimed it was "not intentional." She explained that she had left her car with the sole intention of speaking with Mauson but that Mauson then suddenly attacked To.

During the fight, defendant saw Mauson use brass knuckles and decided to "get involved." She told Mauson to put down the brass knuckles and walked towards him. According to defendant, "*he [Mauson] swings at me*" while stating: "I'm not going to hit a girl." (Italics added.) Defendant explained that Mauson was not able to strike her because she "kind of flopped it"; "[h]e didn't hit me 'cause I went like this. . . . I put my arm up like this. 'Cause I don't want to get hit

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[7] Peng conceded that he had told the police that when Mauson did not drop the brass knuckles, defendant, who had her knife out, tried to grab them from him.

The investigating officer (Sergeant Richard Biddle) testified that Peng told him that Mauson had raised his arm to defendant but then put it down after stating that he did not want to hit her. Defendant told Mauson to drop the brass knuckles and tried to grab them from him. In regard to the stabbing, defendant had extended the knife toward Mauson, in a "slashing" and "thrusting" motion. Peng told the officer that "[Mauson] tries to make a forward move. . . . She tries to swing like this. She wants to scare him away, but he walks into it. He actually walks into the knife doing this. He actually walked into it."

for any reason." In response to a question from the detective, defendant agreed that she had put her arm up in self defense. Defendant explained that she again told Mauson to put down the brass knuckles. Mauson looked at her and said: "No, like, fuck you, who the fuck are you? I'll beat your ass, too." Defendant explained: "*[He had] like that look* where it's just the fuck you look, like who gives a fuck, *I'll fucking kill you, too. That look*." (Italics added.) Defendant had her knife, having taken it out after Mauson had first swung at her. She told Mauson: "Look, dude, I'm not going to stab you. . . . But you need to fucking back the fuck away from me and stop swinging at me, 'cause I'm not going to hurt you." Mauson then "*leaned toward [her]* and [she] got jolted and it [the knife] stabbed him." (Italics added.) She had not swung the knife at him. At another point, she explained: "He [Mauson] kind of like thought I was like, you know, going to flinch back and *I just got scared and it [the knife] went up*." (Italics added.)

When defendant was asked if she knew that Mauson had "a history of fighting," she replied: "So I've heard." When the police told defendant that they could not take her "self-defense story at face value, because of so many lies tonight," she replied: "There is no self-defense story. There's an accidental story, right?"

The defense did not to call any witnesses.[8]

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[8] During the discussion about jury instructions, defense counsel explained that he had originally intended to call Peng as a defense witness "to develop a self-defense argument in this case" but then decided there was no need to do so after Peng had testified during the prosecution's case. (At the preliminary hearing, Peng had given testimony as a defense witness to support a theory of self-defense.)

2. *The Instructions*

Pursuant to defendant's request, the trial court submitted the pattern instructions explaining the general principles of homicide, the concept of malice aforethought (express and implied), degrees of murder, the effect of provocation on determining the degree of murder, defense of others, and voluntary manslaughter based upon an imperfect assertion of defense of others. (CALCRIM Nos. 500, 505, 520, 521, 522, 571.)

Defendant also asked the court to instruct on the privilege of self-defense, voluntary manslaughter based upon an imperfect assertion of self-defense, involuntary manslaughter, and accident. (CALCRIM Nos. 505, 571, 580, & 510.) Defendant relied upon her pre-trial statements to the police and Peng's trial testimony, stating that the theories of self-defense and defense of others were "inexorably intertwined."[9] The prosecutor objected to submission of the instructions. Following lengthy argument about the instructions, the court declined to submit them, finding there was no substantial evidence to support the theories underlying the instructions.[10]

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[9] Defense counsel explained: "[T]he issue of self-defense is inexorably intertwined with defense of others. The evidence, or our take on the evidence is that [defendant] stepped in between Mauson and Wally [To] and that that ended the confrontation, if you will, between Wally [To] and Mauson. That she was attempting to stop any further aggression, i.e., acting in defense of others, asking him to take off the brass knuckles. Whereupon, there is evidence that he [Mauson] took a swing at her. . . . At that point the situation may have changed from where it initially began as a defense of others, and turned into a self-defense."

Although the prosecutor had objected to submitting instructions about defense of others and imperfect defense of others, the trial court overruled those objections.

[10] In explaining why the evidence did not warrant giving the requested instructions, the court made this observation about Peng's testimony. "I think at best there's a slight testimony by Peng, who I wouldn't personally give a lot of weight to his testimony in terms of credibility."

3. *The Closing Arguments*

The prosecutor sought a conviction of first degree murder. She urged that defense of others did not apply because defendant had acted to avenge, not to protect, To. She argued that the fight between the two men was over before defendant stopped between them and that there was no evidence that Mauson had been aggressive after the two men had separated. Consequently, defendant could not have reasonably believed that there was a need to defend To. The prosecutor characterized defendant's words and actions as those of an aggressor and reiterated that defendant had never told the police that she had stabbed Mauson in order to protect To. In passing, the prosecutor noted that this case involved neither self-defense nor a claim of accident.[11]

In a subsequent discussion about the jury instructions, defense counsel stated that "the credibility and quality and tone of [Peng's] testimony is something that I think is really for the jury to decide." The trial court replied: "I don't disagree with you. . . . It was not the intention of making the comments to indicate that that was a deciding factor for the court making the ruling. Court's ruling is based on the entirety of the evidence. . . . [¶] The comment was made about Mr. Peng was perhaps it was gratuitous and perhaps I should not have made the comment at all, because obviously it added to some confusion, but as far as the record is concerned, as far as the intention of the court in making its ruling, it was based upon the court's evaluation of the entire record before it. And on that basis, the court found and does still find that there was not sufficient evidence in the record to support the instruction [about self-defense] that was requested."

[11] Near the conclusion of the opening portion of her closing argument, the prosecutor stated: "Ladies and gentlemen, the only justification that she [defendant] had for doing this, it's not self-defense. . . . It's not accident. . . . The court did not read you that law. It's not an accident. That's not before you either. The only justification that [defendant] could have had was that she did this to defend her brother."

After the prosecutor completed her argument, defense counsel moved for a mistrial. He claimed that the remarks set forth above constituted prejudicial prosecutorial misconduct. The trial court denied the motion.

The defense closing argument focused, in general, on defendant's state of mind and, in specific, on whether defendant was reasonable in believing that the fight between Mauson and To was *not* finished so that there was a need to defend To. Defense counsel correctly noted that if the jury had a reasonable doubt about the application of the privilege of defense of others, it was required to acquit. Defense counsel made a passing reference to the theory of imperfect defense of others, a theory the prosecutor did not address.

4. *The Verdict*

The jury acquitted defendant of first degree murder and convicted her of second degree murder with the finding that she had personally used a deadly and dangerous weapon (the knife).

5. *The Motion for New Trial*

Defendant moved for a new trial. She urged, among other points, that the trial court had committed prejudicial error in rejecting her instructional requests.

At the hearing held on the motion, defendant raised for the first time the additional claim that the trial court had the sua sponte duty to submit voluntary manslaughter instructions based upon the theory of a killing committed in the heat of passion. Following lengthy argument, the trial court denied the new trial motion. It found "there was not sufficient evidence to warrant the requested instruction[s]."

DISCUSSION

A. *The Duty to Instruct*

The trial court is obligated to submit instructions about lesser included offenses and defenses if the record contains substantial evidence to support the

instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) "On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given." (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.) In this context, substantial evidence means evidence from which a jury composed of reasonable persons could conclude either that it has a reasonable doubt about the application of a defense (the murder was justified based upon self-defense or the killing was the result of an accident) or that the lesser included offense (voluntary or involuntary manslaughter) was committed. "In deciding whether evidence is 'substantial' in this context, a [trial] court determines only its bare legal sufficiency, not its weight." (*Breverman, supra*, 19 Cal.4th at p. 177.) In making that decision, the trial court *cannot* evaluate the credibility of witnesses. Assessing witness credibility is exclusively the jury's function and is not to be usurped by the trial court when it determines whether substantial evidence supports submission of instructions. (*Id.* at p. 162; *People v. Elize* (1999) 71 Cal.App.4th 605, 615.) The fact that the evidence relied upon by the defense in requesting the instructions "may be incredible, or is not of a character to inspire belief, does not authorize the refusal of an instruction based thereon, for that is a question within the exclusive province of the jury." (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143.)

As an appellate court, we do not defer to the trial court's ruling. Instead, we apply "the independent or de novo standard of review" to the trial court's decision to decline to instruct about a defense or lesser included offense based upon its conclusion that substantial evidence has not been presented to support the instructions. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

B. *The Defenses and the Lesser Included Offenses*

"For self-defense, the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1427.) In addition, the defendant may use only that amount of force which is reasonably necessary to defend against the danger. (*People v. Clark* (1982) 130 Cal.App.3d 371, 380.) If the record contains substantial evidence of self-defense, the trial court must instruct upon that theory if the defendant so requests. (*People v. Elize, supra*, 71 Cal.App.4th at pp. 611-615.) When a jury is instructed about self-defense, it is informed that the prosecution must prove beyond a reasonable doubt that the killing was not justified. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341.) If the jury has a reasonable doubt whether the defense applies, it must acquit the defendant of the crime charged (here, murder).

Voluntary manslaughter, based upon a theory of imperfect self-defense is a lesser offense included in the crime of murder, not a defense to the crime. (*People v. Barton* (1995) 12 Cal.4th 186, 200.) The trial court has the obligation to instruct about voluntary manslaughter if the theory finds substantial support in the evidence. A defendant acts in imperfect self-defense if her belief about either the need to defend herself or the need to use deadly force is unreasonable. This belief negates the malice aforethought element of murder and reduces the crime to voluntary manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Flannel* (1979) 25 Cal.3d 668, 680.) When the jury is instructed about this theory, it is informed that in order to convict the defendant of murder, the prosecution must prove beyond a reasonable doubt that the defendant did not act in imperfect self-defense. If the prosecution fails to meet that burden, it must find the defendant

not guilty of murder and can, instead, convict of voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462.)

Similarly, voluntary manslaughter based upon heat of passion is a lesser included offense to murder. It requires provocation such that the defendant's "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*Breverman, supra,* 19 Cal.4th at p. 163.) If there is substantial evidence of provocation, the court must submit this instruction. If this theory is submitted to the jury, it becomes the prosecution's burden to prove beyond a reasonable doubt that the defendant did not kill in the heat of passion. If the prosecution fails to meet that burden, the jury must acquit of murder (CALCRIM No. 570).

Involuntary manslaughter is a lesser included offense to murder. It requires a killing committed "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192, subd. (b).) CALCRIM No. 580 is the pattern instruction about involuntary manslaughter. The instruction explains the concept of criminal negligence as it applies to involuntary manslaughter and then concludes: "In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter."

Lastly, a killing which results from an accident is excused and therefore is not unlawful. (CALCRIM No. 510.) "The claim that a homicide was 'committed

by accident and misfortune' (§ 195), . . . 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.' [Citations.]" (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) Consequently, it is the prosecutor's burden to prove beyond a reasonable doubt that the killing was not the result of an accident; in other words, the defense need only raise a reasonable doubt about accident to obtain an acquittal. (*Ibid.*) The trial court is required to instruct about accident upon request even if the defense also relies upon self-defense as long as there is substantial evidence to support the theory of an accidental killing. (*People v. Elize, supra,* 71 Cal.App.4th at pp. 610-616.)

C. *The Trial Court Erred in Denying Defendant's Request for Additional Instructions*

In this case, the record contains substantial evidence to support the theory that defendant acted in self-defense when she stabbed Mauson. Mauson had initiated the fight with To by charging at him when he left the car. After the fight between the two men subsided, defendant stepped between them. According to Peng, the fight did not appear over because Mauson still had an aggressive demeanor. Mauson then raised his arm with the brass knuckles as if he was going to strike defendant. Defendant told Mauson to drop the brass knuckles but Mauson responded by quickly lunging at her. At that point, defendant stabbed Mauson. In a similar vein, defendant told the police that when she first walked towards Mauson, he swung at her. She avoided his blow and told him to put down the brass knuckles. He responded by threatening: "I'll beat your ass, too." In addition, defendant interpreted his look to say: "I'll fucking kill you, too." Although defendant told Mauson that she did not intend to stab him, he came in her direction. She was scared and stabbed him.

Given the existence of substantial evidence to support a theory of self-defense, it therefore follows that substantial evidence was present to support a theory of imperfect self-defense. "Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. [Citations.]" (Bench Notes to CALCRIM No. 571.)

In regard to voluntary manslaughter based upon a heat of passion killing, Mauson had attacked To without justification, had used threatening profanity toward defendant and had attempted to hit defendant before he was stabbed. And as the trial court noted in agreeing to give the instruction about the effect of provocation on the degree of murder, Mauson's threatening cell phone call made immediately before the confrontation "could be characterized as some degree of provocation."

As for involuntary manslaughter, a reasonable jury could find that defendant acted in a criminally negligent manner when she inserted herself between the two men, held out a knife, shouted profanity at Mauson, and attempted to grab the brass knuckles from Mauson.[12]

Lastly, there was sufficient evidence of accident. Defendant's statements to the police and portions of Peng's testimony are reasonably susceptible of the

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[12] On this appeal, defendant first raised her argument about involuntary manslaughter in her reply brief. Nonetheless, we address the point because it was raised in the trial court and for the guidance of the trial court upon retrial.

interpretation that when defendant held the knife out to defend herself, Mauson inadvertently impaled himself upon it when he lunged at her.

D. *The Trial Court's Error Was Prejudicial*

The last question is whether the trial court's failure to instruct was prejudicial. "'[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence [and] . . . an erroneous failure to instruct on a lesser included offense constitutes a denial of that right.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

"'"[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." [Citations.]'" (*People v. Elliot* (2005) 37 Cal.4th 453, 475.) However, we cannot rely upon that principle in this case. None of the submitted instructions explained the principles of self-defense, imperfect self-defense, a heat of passion killing, criminal negligence, or accident. And as framed by the parties' closing arguments, the dispositive issue was ONLY whether defendant was reasonable in believing that there was a need to intervene and defend To. Consequently, the jury's conviction of second degree murder cannot be interpreted as a rejection of the theories posed by the omitted instructions. We therefore must determine whether the failure to instruct was prejudicial.

This error is reviewed under the *Watson* standard: "A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Breverman, supra*, 19 Cal.4th at p. 178.) In this context, "[p]robability under *Watson* 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.)

In assessing prejudice, our review "focuses not on what a reasonable jury *could* do [the standard by which we evaluate whether substantial evidence was presented to create the duty to submit the requested instructions], but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial." (*Breverman, supra*, 19 Cal.4th at pp. 177-178.)

Here, there is a reasonable likelihood that a more favorable outcome would have occurred if the trial court had granted the defense request to instruct about imperfect self-defense. Peng's testimony and defendant's statements about Mauson's verbal threats and actions constitute evidence that defendant stabbed Mauson believing that she was in danger of imminent harm. But there was also significant evidence about defendant's provocative words and aggressive actions. Based on this record (as well as how the parties addressed the issue of defense of

others), the dispositive issue would be whether defendant's belief in the need to defend herself with the knife was reasonable. We believe that there is a reasonable probability that a jury properly instructed about imperfect self-defense would have acquitted her of murder and convicted, instead, of voluntary manslaughter. The fact that the jury, by convicting of second degree murder, implicitly rejected the claim of defense of others (perfect or imperfect) does not change this conclusion. The court's instructional error precluded the jury from considering whether defendant, who may have initially intervened to protect To, was defending *herself* when she stabbed Mauson.

In light of this conclusion, reversal for retrial is required. Consequently, there is no need to address whether defendant was prejudiced by the trial court's failure to instruct on her other theories. The instructions to be submitted at retrial depend, of course, on the specific evidence presented at that trial by the parties. Needless to say, if the evidence is identical to that presented at the first trial, the trial court is required to submit instructions about self-defense, imperfect self-defense, a killing committed in the heat of passion, involuntary manslaughter, and accident. If the evidence differs, the trial court is to apply the principles and authorities set forth in this opinion in deciding on the instructions to be used.

DISPOSITION

The judgment is reversed and the matter remanded for retrial within the time limits set by Penal Code section 1382, subdivision (a)(2).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.